Sup... U.S.
FILED

(1) 02 1344 FEB 24 2003

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANTONIO VINCENTE DIAS,

Petitioner,

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: February 24, 2003

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22 pp

QUESTION PRESENTED

Whether retroactive application of the repeal of the discretionary waiver of deportation (Immigration and Nationality Act §212(c) to immigrants convicted at trial fundamentally disrupts the reliance interest of such immigrants; in other words, whether the protections of this Court's decision in *St. Cyr v. INS* (discussed, *infra*) should not extend equally to those immigrants who chose a trial over a negotiated disposition in the belief that a conviction would not lead to mandatory deportation?

LIST OF PARTIES

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The opinion of the United States Court of Appeals for the First Circuit appears at Appendix A to this petition and is reported at *Antonio Vincente Dias v. Immigration & Naturalization Service,* _____F.3d ____ (1st Cir. 2002).

The July 31, 2002 decision of Board of Immigration Appeals appears at Appendix B to this petition.

JURISDICTION

The United States Court of Appeals for the First Circuit entered its decision on November 27, 2002. No petition for rehearing was filed in this case.

Petitioner, Antonio Vincente Dias, invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, §9 of the United States Constitution: "No Bill of Attainder or *ex post facto* Law shall be passed."

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Up through the time of petitioner Dias' conviction, the applicable "discretionary waiver of deportation" was contained in the Immigration and Nationality Act, §212 (c) also 8 U.S.C. §1182(c)(both now repealed):

> Non-applicability of subsection (a). Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted

> in the discretion of the Attorney General without regard to the provisions of subsection (a)(other than paragraphs (3) and (9) (C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211 (b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and served for such felony or felonies a term of imprisonment of at least five years.

The following relevant portions of The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, §404(d) came into effect over one year after petitioner Dias' conviction:

> (d) Classes of Excludable Aliens.-- Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended-- (1) by striking "The first sentence of this" and inserting "This"; and (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which

both predicate offenses are covered by section 241(a)(2)(A)(i).

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104 - 208, §304 (b) repealed the 212(c) discretionary waiver more than a year after petitioner's conviction as follows: "(b) REPEAL OF SECTION 212(c).-Section 212(c) (8 U.S.C. 1182(c)) is repealed."

STATEMENT OF THE CASE

Mr. Dias, a lawful permanent United States resident, was convicted after a trial of possession of marihuana with intent to distribute, a criminal charge that made him deportable. The offense, codified in the Massachusetts General Laws at c. 94C, §32C, carried a maximum penalty of two years' incarceration in the county jail.*

Mr. Dias was given a one-year sentence on September 26, 1995. He would have been eligible for a waiver of deportation under the immigration

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* The criminal action involved other charges that did not affect the calculus of Mr. Dias' decision to go to trial. Mr. Dias was also charged with an offense called "Drug Violation Near School Zone or Park" that carried a potential 15-year penalty, but not as charged and tried in the District Court Department where the maximum penalty to impose was 2 & 1/2 years. The District Court vacated Mr. Dias conviction on this offense when it granted certain post-trial motions. Mr. Dias was also acquitted of a companion conspiracy charge (M.G.L. c. 94C, §40) that carried the same penalty as the possession with intent to distribute charge.

law in effect when he was convicted, but his removal proceedings were commenced after AEDPA's and IIRIRA's effective dates.

Mr. Dias would have been eligible for the waiver regardless whether he pled guilty or was found guilty after a trial. In order to best protect his immigration status, therefore, Mr. Dias' rational choice was to elect a trial at which he could be acquitted. In contradistinction to *Cyr, infra,* Mr. Dias' decision to try his case instead of making a plea bargain was not driven by the need to remain eligible for a discretionary waiver or deportation; rather, it was supported by the expectation that he would remain eligible regardless of outcome.

Before the effective dates of the AEDPA and the IIRIRA, §212(c) of the Immigration and Nationality Act of 1952 was interpreted to give the Attorney General broad discretion to waive deportation of resident aliens. The class of aliens depending on §212(c) relief was reduced in 1996 by §401 of AEDPA, which identified a broad set of offenses for which convictions would preclude such relief; and by IIRIRA, which repealed §212(c) and replaced it with a new section excluding from the class anyone "convicted of an aggravated felony," 8 U.S.C. §1229b(a)(3).

REASONS FOR GRANTING THE PETITION

Important Question Not Settled/ Decision in Conflict

The First Circuit's judgment below reaches an important question of federal law that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with the relevant decisions of this Court. Rule 10 (c), Supreme Court Rules.

The INS applies the repeal of §212(c) relief retroactively in a way that will substantially and fundamentally alter the immigration consequences of an accused immigrant's decision to elect a trial. Before the repeal of §212(c), petitioner Dias' most prudent course for protecting his immigration status was to take his case to trial. That choice was anchored in the belief that he was preserving his eligibility to stay in the United States. If he won, there was no conviction on which to deport him; if he lost, a §212(c) waiver remained available since the maximum penalty did not exceed five years. The decision to elect a trial, therefore, was based on a fundamental reliance interest in the availability of relief from deportation. *See, INS v. St. Cyr,* 583 U.S. 289 (2001). *St. Cyr* acknowledged that the alien defendant's decision to accept a plea bargain and sentence of less than five years was driven by the alien's desire to protect his immigration status; the interest was one protected by "familiar considerations of fair notice, reasonable reliance, and settled

expectations." *St. Cyr, supra* at ____, citing *Landsgraf v. USI Film Products,* 511 U.S. 244, 270 (1994). An alien tried and convicted (before the effective dates of the AEDPA and the IIRIRA) of an offense carrying a maximum imprisonment penalty of two years (such as the petitioner) should be afforded no less protection against retroactive and *ex post facto* laws than an alien pleading guilty to a greater offense and receiving a higher penalty.

The rationale of *St. Cyr* applies equally to persons convicted on plea or verdict of crimes for which a discretionary waiver was available. Retroactive application of AEDPA and IIRIRA is improper in either event because: (1) Congress failed to direct with requisite clarity that the law applied retroactively; and (2) such an application would have a genuine retroactive effect, i.e., it attaches a new disability to an alien who entered a guilty plea *or went to trial* with the expectation that he would be eligible for § 212(c) relief. *St. Cyr,* 533 U.S. *supra* at 314-25 citing *Landsgraf v. USI Film Products,* 511 U.S. 244 (1994).

CONCLUSION

For the reasons set forth above, this Court should grant petitioner's request for writ of certiorari to the United States Court of Appeals for the First Circuit.

Dated this 24th day of February, 2003 at Boston, Massachusetts.

Respectfully submitted,

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APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: Jul 31, 2002

File: A36-201-682-Boston

In re: DIAS, ANTONIO VICENTE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Vaziri, Emili

ORDER:

PER CURIAM. While the appeal has been pending, the United States Supreme Court determined that the restrictions on section 212(c) relief do not apply retroactively to aliens who entered into a plea agreement prior to April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. *See INS v. St. Cyr*, 533 U.S. 289 (2001). However, this alien is not aided by the Supreme Court's *St. Cyr* ruling. The record reflects that the respondent is not

eligible for section 212 (c) relief because the alien did not enter into a plea agreement, but rather was tried and found guilty of the crime which provides the basis for these proceedings. Accordingly, the appeal is dismissed.

/s/_____
FOR THE BOARD

APPENDIX B

United States Court of Appeals

For the First Circuit

No. 02-2074

ANTONIO VICENTE DIAS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

Before
Lynch, Circuit Judge,
Cyr, Senior Circuit Judge,
and Lipez, Circuit Judge.

Joseph F. Dugan on Petition for Review of an Order of The Board of Immigration Appeals for petitioner.

Robert D. McCallum, Jr., Assistant Attorney General, Civil Division, Christopher C. Fuller, Senior Litigation Counsel, Office of Immigration Litigation, and Brenda M. O'Malley, Trial Attorney, Office of Immigration Litigation, Civil Division, Department of Justice, on Respondent's Motion to Dismiss Petition for Review for Lack of Jurisdiction and Opposition to Petitioner's Motion for a Stay of Removal for respondent.

November 27, 2002

Per Curiam. In 1995, petitioner Dias was convicted in the trial court for the Commonwealth of Massachusetts of a violation of the drug laws of that state. At the time of the conviction, petitioner was eligible for a discretionary waiver of deportation pursuant to former § 212(c) of the Immigration and Nationality Act. In 1996, § 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA) restricted the availability of § 212(c) relief for aliens convicted of a number of felonies, including petitioner's controlled substance offense.

The issue presented by this petition for review is whether application of the new law to petitioner would have an impermissible retroactive effect. Relying on INS v. St. Cyr, 533 U.S. 289 (2001), petitioner argues that it would. In St. Cyr, the Court held that, because new legal consequences would attach to events completed before its enactment, application of AEDPA to alien criminal defendants who pled guilty prior to AEDPA would

constitute an "impermissible retroactive effect." Id., at 321. However, the decision in St. Cyr relied on the Court's recognition that (1) plea agreements generally involve a quid pro quo between a defendant and the government and (2) that aliens often attach much importance to the immigration consequences of the decision whether or not to enter into an agreement. "Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." St. Cyr, 533 U.S. at 322 (citation omitted). Therefore, the potential for unfairness to one who pled guilty in reliance on immigration law as it existed at the time of the plea would be significant if the new law were applied retroactively. For this reason, the Court held that alien criminal defendants who pled guilty prior to AEDPA are eligible to apply for discretionary relief under former § 212(c) of the INA.

In contrast, those alien criminal defendants who chose to go to trial, prior to the change wrought by AEDPA, were not relying on immigration law as it existed at the time in making that decision. The inquiry into retroactive application of a statute requires a "commonsense, functional judgment" about the new legal consequences that attach to events completed before its passage. St. Cyr, 533 U.S. at 321.

Although predating St. Cyr, our decision in Mattis v. Reno, 212 F.3d 31 (1st Cir. 2000), foreshadowed the correct outcome of this case. In Mattis we

held that the retroactivity analysis must include an examination of reliance in a guilty plea situation. It follows that, having been convicted after a trial where there was not, and could not have been, reliance by the defendant on the availability of discretionary relief, Dias may not argue that the statute has impermissible retroactive effect as to him.

We now join the Seventh and Ninth Circuits in ruling that application of the new statutory limitations on discretionary relief does not have an impermissible retroactive effect on those aliens who would have been eligible for discretionary relief when they were convicted of a felony after trial. See Armendariz v. Sonchik, 291 F.3d 1116, 1121 (9th Cir. 2002)("aliens who elected a jury trial cannot plausibly claim that they would have acted any differently if they had known about § 440(d)"); LaGuerre v. Reno, 164 F.3d 1035, 1041 (7th Cir. 1998).

Affirmed.